IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL ACTION DIVISION

FLOYD J. KENYON, SR. and FLORENCE
KENYON, his wife,
Plaintiffs,

Case No. 00-5401
Division: "D"

-vs-

R.J. REYNOLDS TOBACCO COMPANY, a
foreign corporation,
Defendants.
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TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE HERBERT BAUMANN
Circuit Judge

TAKEN AT: Courtroom Number 1
Hillsborough County Courthouse
Tampa, Florida

DATE: 29 November 2001

TIME: Commencing at 1:30 p.m.

REPORTED BY: Mary Elizabeth Blazer, RPR
Notary Public, State of Florida

STENOGRAPHICALLY RECORDED (ORIGINAL)
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ALSO PRESENT:

FLOYD J. KENYON, SR. (Plaintiff)
FLORENCE KENYON (Plaintiff)
APRIL GEORGE (Paralegal to Mr. Acosta)
DAN DONAHUE (Corporate Rep. of R.J. Reynolds)
CHARLES WRIGHT (Technical Assistant - R.J. Reynolds)
STEVE BERESHEIM (Technical Assistant - R.J. Reynolds)

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I N D E X T O P R O C E E D I N G S

Witness or Proceedings Page

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DAVID TOWNSEND, Ph.D.
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(1:30 p.m.) P R O C E E D I N G S

THE BAILIFF: All rise. Civil court, Division "D," is now back in session.

THE COURT: You may be seated.

Ready, Ms. Parker, Mr. Acosta?

MS. PARKER: Yes, Your Honor.

MR. ACOSTA: Yes, Your Honor.

THE COURT: Go ahead and get the jurors.

(Whereupon, the jury returned at 1:35 p.m.)

MR. ACOSTA: May I approach the clerk, Your Honor?

THE COURT: You may.

(Pause)

THE BAILIFF: All rise.

THE COURT: You may be seated.

All right. Good afternoon, ladies and gentlemen. Mr. Acosta, you may proceed.

MR. ACOSTA: Thank you, Your Honor.

THE COURT: You may.

BY MR. ACOSTA:

Q. Good afternoon, Dr. Townsend. Good afternoon.

A. Good afternoon.

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Q. Doctor Townsend, you would agree that the Premiere was patented as a drug delivery article, true?

A. No, I don't agree with that. It was -- it was patented as a cigarette. There were a number of other embodiments that was conceivable. And one of those was to use it to deliver aerosols of various types of materials. The original invention of Premiere was as a cigarette.

Q. Well, let me show you what's been previously admitted as Defense Exhibit, AN-00738.

This is from the American Medical Association, April 25th, 1988. Citizen -- Petition of the American Medical Association.

If I can refer to page 3, it states: The -- let me get the pointer out here.

"The patent application expressly states that the R.J.R. product may be used as a drug delivery article."

Are you familiar with that, Dr. Townsend?

A. I think in my answer to your previous question, I indicated that in the patent, there are several embodiments spoken to of the technology. Premiere was a cigarette by the way it was put

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together.

More general versions of that technology, which include a heat source and a capsule, and some substrate inside the capsule like alumina, were considered as possibly ways to -- to deliver an aerosol to -- to a person, say, for -- of various drugs, for example, that might be effective for asthma or the like. You know, it's -- so, we recognized the general nature of the technology.

Your question was specifically about Premiere. And the way Premiere was constructed was very specific. And the way it was constructed included tobacco and tobacco materials and was a cigarette.

Q. My question is simple: Did the patent application state that Premiere may be used as a drug delivery article? Yes or no?

A. And I answered that in your very first question. I said there are some embodiments spoken to in the patent that include that.

Q. Thank you.

Now, I believe that yesterday or the day before, correct me if I'm wrong, that you testified that habituation was not a factor used by R.J.R. in the design of the cigarette; is that

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correct?
A. That's absolutely correct.
Q. Okay.
Then what I want to do is I want to ask you a question about one of the documents we have in evidence. This is Plaintiff's Exhibit 693.20. Let me show it to you. And I think I may have a copy for you.
MR. ACOSTA: May I approach, Your Honor?
THE COURT: You may.
BY MR. ACOSTA:
Q. This is an R.J. Reynolds draft document to Dr. Murray Senkus and Mr. Edward A. Vassallo dated September 19, 1969 titled Proposal of a New Consumer-Oriented Business Strategy for R.J.R. Tobacco Company based upon an Analysis of the Effects of the Smoking and Health Controversy and the Safer Cigarette Strategy on Consumer Behavior.
And would you agree that this is a document authored by Claude Teague?
A. This is a document authored by Claude Teague.
Q. And, again, in 1969, Dr. Teague would have been an assistant director of research and

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development back at Reynolds research lab?
A. I'm not sure that's true. I really don't know what his title was at that point.
Q. All right.
This is about 8 -- 15, 17, 18 years after he started as a Ph.D. in 1953 by this point in time?
A. That's about right. All I'm saying is I don't know his title at this point.
Q. Okay.
Now, would you agree that Dr. Teague predicted that the design of a safer cigarette strategy really wouldn't be effective for a low tar cigarette?
A. I think there's a number of general assumptions that Dr. Teague made in this -- in this -- in this report, or in this paper.
I think he was questioning the safer cigarette strategy in a number of ways throughout this document.
Q. And Dr. Teague concluded, did he not, that the habituation factor was extremely strong and should be considered in the design of the cigarette? True?
A. Dr. Teague talks about a number of

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things in this paper, including what he called a habituation factor, a gratification factor, a cost factor, a government regulatory factor. And he devised, frankly, as part of his work at the University of North Carolina at Chapel Hill as a student, as an MBA student, he devised a rough model of what he thought was important in the cigarette business. This was, again, one of Dr. Teague's think pieces.

Q. Is this something that you think Dr. Teague did all by himself?

A. Yes, I do. In fact, I think this clearly is a result of his experience at the University of North Carolina at Chapel Hill as an MBA student.

And, in fact, if you turn to page 20, you'll see he acknowledges the faculty of the executive program at the University of North Carolina for stimulating his interest in this area. And in particular, to his advisor there, Dr. Rehder, who provided encouragement and special assistance in the areas of behavioral science, strategic planning and systems analysis.

This was, in my opinion after reading this document a number of times, Dr. Teague's

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personal contribution.

Q. Wasn't he also indebted to Dr. Murray Senkus who was the director of research and development at that time?

A. He says he was.

Q. And Dr. Frank Colby, who is another Ph.D. scientist at Reynolds at that time?

A. He says that as well.

Q. And Dr. Marion, and Mr. -- excuse me, Mr. Marion, Mr. Blevins, Dr. Haller, Dr. Neilson, and Dr. A. H. Laurene all had given him ideas for use in this paper?

A. All he says is the writer is indebted to these people. Down at the bottom he says that --

Q. For ideas?

A. From the faculty and in particular his advisor, for stimulating his interest in the area and particularly his advisor who provided special encouragement, special assistance in the areas of behavioral science, strategic planning and systems analysis.

Q. Dr. Townsend, the names I just read, plus Dr. Woods and Dr. Cavallito for ideas, suggestions, criticisms, data and encouragement in developing and pursuing the thoughts presented above.

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This wasn't solely Dr. Teague's idea, was it?
A. That's what you would infer from this.
Q. Thank you.
And the habituation factor, he created a formula for this, didn't he?
A. Yes.
Q. Indicating what the propensity would be for a person to smoke? And one of the stronger items is the habituation factor, which he calls H; is that true?
A. He includes in his equation a nicotine habituation factor. I don't see anywhere in here where it says it's one of the stronger items.
Q. All right.
Would you agree that he said the habituation factor is believed to be relatively constant and large for confirmed smokers?
A. He may have said that --
Q. Page 6?
A. -- and I just didn't recall him saying it was one of the stronger factors.
Q. Page 6. He states -- let me make this a little bigger.
"An individual's propensity to smoke is seen to be determined by a variety of factors,

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positive and negative. The positive factors which have traditionally led to high values of "P" have been physiological habituation (Nicotine) factor, H and G, all other gratifications, physical, emotional, social, et cetera, expected or derived from smoking relatively high nicotine, high flavor cigarettes.

The habituation factor, "H", is believed to be relatively constant and large for confirmed smokers. The gratification factor "G", in the past was strongly positive but now may vary widely in value depending upon the needs of the smoker, his habit pattern, his like or dislike for a given flavor or level of flavor, health anxiety associated with smoking, social attitudes towards smoking and the like. The smoking health controversy results in a net decrease in the value of gratification factor "G", for many smokers, and in the extreme case this factor may I assume zero or even negative values."

Did I read that correctly, Doctor?

A. I believe you did.

Q. And in this paper Dr. Teague takes the position that the safer cigarette strategy would have serious long-term implications which were somewhat disturbing for the company, true?

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A. If you'll point me to a passage we can look at.

Q. At page 9.

At the very top of page 9.

Whereby he states: "However, it will be seen below this strategy has serious long-term implications which are somewhat disturbing."

A. That's what he says mainly because he's defined the safer cigarette strategy only as the move to lower tar, lower nicotine cigarettes. It turns out of course as we know he's wrong because consumers have continued to move down to low tar, low nicotine cigarettes which he was speculating consumers would not. In fact, since Dr. Teague wrote this memo, of course, light cigarettes has become the largest category of cigarettes sold in the U.S.

Q. Didn't we discuss yesterday a press release in which the FTC found that after 50 years of design changes of cigarettes that it really wasn't safe?

A. We talked about that and it's absolutely incorrect that is a political conclusion driven by a number of scientists who were asked by NIH, and to actually work on that report.

Q. And isn't this something that

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Dr. Teague predicted back in 1968, '69 when he wrote this?

A. I think Dr. Teague in -- my take on this report is that Dr. Teague was in fact referring to the lack of consumer acceptance of low tar cigarettes. What has happened over the years is the consumers have -- have accepted low tar cigarettes. Now, as we indicated in testimony earlier this week, that trend seemed to level out, has opened the doors for a number of other approaches to safer cigarettes.

Q. Dr. Teague felt that for Reynolds that the increasing quest for a safer cigarette would eventually end has something self-defeating?

A. Where are you reading from?

Q. Top of page 10, right there.

A. I think that's exactly consistent with everything that I've said so far. If you read the rest of the sentence it says: "This may well mean that the increasing quest for safer cigarettes is in the end self-defeating since it leads ultimately to cigarettes wholly unsatisfying to the smoker and the market vantages". So he talking about if you make the tar and nicotine levels go down so far they become unacceptable to smokers and people find them unacceptable.

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Q. In other words --
A. And don't buy them.
Q. -- if you make the cigarette safe, he's saying it's self-defeating for the industry because people aren't going to buy them, right?
A. I think I've already talked about safe cigarettes. There are no safe cigarettes. There are cigarettes that have reduced risk and probably are safer. But there is no safe cigarette. So I don't understand your question.
Q. Well, Dr. Teague -- do you agree -- let me ask it this way: Do you agree that unless there was some miraculous solution to the smoking and health problem that the safer cigarette strategy would be equivalent in the long-term to liquidation of the cigarette industry?
A. I completely disagree with this. Because Dr. -- Dr. Teague as I've already said several times is assuming, number one, that the only strategy for safer cigarettes is to reduce the tar and nicotine level. In fact, there are many. He's also assuming that if one reduces the tar and nicotine levels from 1969, that those products would be unacceptable. And people would quit buying them and Reynolds would go out of business.

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The fact of the matter is that the tar and nicotine levels did come down dramatically, and since 1969 people continue to trade down to the point where lights is the largest category of cigarettes. So Dr. Teague was wrong on a number of fronts.

Q. Although he was wrong, in your opinion, Dr. Townsend, didn't he have another idea? He had an alternative strategy, didn't he?

A. Is that a question?

Q. Yes.

A. Dr. Teague had lots of ideas. He always had alternative strategies. And he was always putting together think pieces like this. Ideas proposing areas of research that were sometimes really far out. The answer to your question is absolutely.

Q. Okay.

And Dr. Teague's alternative strategy was something that he thought was imperative for R.J. Reynolds, true?

A. I think most all of Dr. Teague's ideas he thought were imperative.

Q. And he also felt that his alternative strategy -- this was something that he had thought of back in 1968, and spent a year consulting with, one

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time or another, Dr. Senkus, and Dr. Laurene and Dr. Cavallito and all the other people we mentioned at the end of this, and he felt -- well, let me ask you this: At the time do you agree that the technology was feasible to make the alternative product that he thought Reynolds should make at the time?

A. And that product would be exactly what?

Q. Well, let me ask you first, did he think -- you say you've read this several times. I'm going to show you the product in a minute. First I want to -- I want to find out from you if you agree with him when he says that he thought that the product that he was proposing was technically feasible?

A. I want to know which product you're talking about because there are at least two in here.

Q. Well, I'll show you both of them, okay?

Do you agree about one but not the other or do you agree that neither of them is --

A. I don't see --

Q. -- technically feasible?

A. If you ask me a question that's specific to a particular idea, then I'll be glad to answer you. But there's two in here and then you ask

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me a general statement, do you agree, I can't answer that question.
THE COURT: Go ahead and ask a question.
BY MR. ACOSTA:
Q. I will. You would agree that at least Dr. Teague thought that the products that he was proposing were technically feasible at the time?
A. I don't know whether he believed that they were technically feasible or not. All I know is what I read in this document.
Q. And this document says, "That it was felt that some tangible evidence showing that the proposed new products are technically feasible would generate interest in the proposed effort and help to bring it into view for consideration.
First product, a transitional cigarette like device. In concept it is a simulated cigarette where tobacco -- where the tobacco rod burns but little or no TPM of 4 or less smoke reaches the smoker."
So he was proposing a cigarette where the smoke didn't reach the smoker, true?
MS. PARKER: Your Honor, objection. Rule of completeness, I would like to ask the

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first line on the first page be read to the jury.

MR. ACOSTA: The first page of the document?

MS. PARKER: Yes, Your Honor.

THE COURT: Go ahead and read that, then pose the question.

MS. PARKER: First page.

MR. ACOSTA: I'm trying to find the first page. Oh, page one?

MS. PARKER: Very beginning.

MR. ACOSTA: I already read that line. It's a draft.

THE COURT: Reread.

MR. ACOSTA: It's a draft.

THE COURT: All right. Ask the question.

BY MR. ACOSTA:

Q. Do you agree it's a draft, Dr. Townsend?

A. If says it is.

Q. Now, this is the chart that followed that a transitional cigarette like device. Were these the two products that Dr. Teague was proposing at the time?

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A. Well, I said at least two. These are two what he called transitional products, there are others that he suggests later on in the document.

Q. The first one had a smoke barrier with tobacco in the front, correct?

A. Yes.

Q. And nicotine was somehow put behind the smoke barrier, correct?

A. That would be my take of it.

Q. So when the smoker inhaled he would get the nicotine, the flavor and the water and the air but he wouldn't get the smoke, that was the -- the design there, wasn't it?

A. In a general sense I think it's right.

Q. The second one, had a -- I can't quite read that. Pressurized something generator. Nicotine flavor, water, et cetera, do you know what that second word is?

A. Aerosol, I believe.

Q. Aerosol. Pressurized aerosol generator, which would provide nicotine flavor in water. Control valve giving measured dosage activated by lip pressure, drawing, et cetera.

Now, this report led to another report, which we've marked and had identified and admitted

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into evidence previously, Plaintiffs' 693.21.

MS. PARKER: Is that a question?

MR. ACOSTA: I'm identifying the document on the record, Your Honor, and going to present --

THE COURT: Well, if that's -- don't make a statement, ask a question, you can identify a document. Disregard the most recent statement until there is a question pending, ladies and gentlemen.

BY MR. ACOSTA:

Q. Dr. Teague, do you have before you Plaintiff's Exhibit 693.21?

A. I'm not Dr. Teague.

Q. You know, I'm sorry, I -- Dr. Townsend.

A. I have 693/210.

Q. Yes.

Signed Claude E. Teague, Junior, dated December 10th, 1969?

A. That's right.

Q. It says; document, have the word draft at the top of it?

A. I don't see that.

Q. Entitled; New Product Strategy for circumventing problems arising from the smoking and

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health controversy?
A. Yes. But I don't see it addressed to anybody in particular.
Q. You've seen this before?
A. Yes.
Q. Again, he reiterates the concept that the industry should -- excuse me, he reiterates the concept that R.J. Reynolds should consider product strategy designed to expand the present market for cigarette satisfaction?
A. Essentially that's what he says.
Q. And again, he reiterates that nicotine is the physiological habituation factor which he considers in his design?
A. I don't think that's new for Dr. Teague at all. That's throughout his documents.
Q. And he indicates that whatever the work is to be done on the product, will result in technology useful in present products as well; true? The bottom of the first page there?
A. That's what he's suggesting. I don't know that that's true, but that's certainly what he suggests.
Q. Well, he indicates that their new strategy in simplistic terms should define the

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satisfaction expected or derived from cigarette smoking and to device and market profitable new products away from conventional new cigarettes which will provide those same satisfactions with no significant hazard to the health of the user. That was the goal; wasn't it?

A. He clearly articulates that as his proposed strategy, which I think is at least the portion about providing products, even on conventional products with no significant hazards to the health of the user. I think that's a lot of the goal.

Q. And these were the products that he came up with in the final -- well, we won't call it a final -- we'll just call it this -- this document. Examples of new products types contemplated. Again we have a traditional tobacco burning. He states that tobacco burns, but little or no smoke reaches the smoker, instead air passing through a flavor capsule delivered -- deliveries nicotine flavor, moisture, et cetera, to the smoker. Inexpensive tobacco could be used.

Does this have any features that -- basic design features in common with the Premiere or the Eclipse?

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A. Not really. Not really.
Both of these designs are really quite different from Eclipse from a cigarette designer's point of view.
Q. The second one doesn't burn any -- any tobacco at all. That would be -- at least in that respect similar to the Premiere?
A. It's -- I think you've misunderstood. Premiere doesn't burn tobacco, but it has a lot of tobacco in it because the heat actually transfers flavors out of the cigarette. So you're transferring tobacco flavors from tobacco.
This number 2, up here on the -- from the report that you're talking about, I think Dr. Teague, the way I understand this, this -- this particular idea doesn't have tobacco in it at all.
Q. And these were products that Dr. Teague thought Reynolds should start making back at that time in 1969?
A. Again, my take on this document is that he was suggesting these as possible directions for unconventional, to use his words, new products. But they weren't just these, he also talked about, for example, esthetically clean chewing products and others.

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So I think he was again throwing out ideas of general directions that one could take and he put down, well, these are two possible examples that one could consider.

Q. I think we've established that Reynolds has never come out with Winston gum, have they?

A. No, of course not.

Q. And Reynolds started to design the Premiere in 1982, some 13 years after this document, correct?

A. I think the development actually began somewhere between '81 and '82.

Q. And then the Premiere, which is the one identified in this document as a -- a drug delivery article, as I understand it, failed in the market, in the late 1980s; true?

A. Premiere failed in the market in 1989. However, you're absolutely incorrect that Premiere was a drug delivery device. We've talked about that. And Premiere is in fact a cigarette with a very specific configuration. The reference that you made that we talked about earlier is to additional embodiments of heating technology that could deliver certain type of drugs such as anti-asthmatics.

Q. Can also deliver crack cocaine, can't

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it?

MS. PARKER: Your Honor --

THE COURT: Sustained.

MR. ACOSTA: Well, Your Honor, let me ask it this way, Dr. Townsend --

MS. PARKER: Your Honor --

MR. ACOSTA: Isn't it true one of the reasons that Premiere failed in the market --

MS. PARKER: Your Honor --

MR. ACOSTA: Can I finish?

THE COURT: Approach for a second. Excuse us.

(Thereupon, the following discussion was had at the bench out of the hearing of the Jury:)

THE COURT: Asking about crack cocaine is -- is --

MR. ACOSTA: It's, it's --

THE COURT: You can ask -- you can ask about what types of substances, but saying delivery of crack cocaine would be some people might consider that to be prejudicial comment.

MR. ACOSTA: It may be, but he claims the reason Premiere because it wasn't acceptable to the consumer and the Surgeon

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General said one of the reasons it is because to deliver cocaine and that's --
THE COURT: But that -- that has nothing to do -- I don't see how that has anything to do with the failure of the -- failure of the product. It wasn't -- I mean it -- just don't -- just don't interject.
(Thereupon, the bench conference was concluded.)
BY MR. ACOSTA:
Q. Dr. Townsend. After Premiere failed, then Reynolds decided to develop Eclipse; true?
A. Yes.
Q. And Eclipse was a cigarette that was created and able to be smoked over a year ago, true? You showed up with a package of Eclipse at the last trial that we had, a year ago, right?
A. Yes.
Q. It has not been successfully marketed yet, has it?
A. It is in the test market.
Q. It was in test market back then; wasn't it?
A. It's been in several test markets.
Q. Now back in the early '70s, after Dr.

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Teague had -- had proposed those alternative products that we saw up there, he felt that the cigarette -- that R.J. Reynolds should stay with its conventional products as long as it could; didn't he?

A. I've seen some language to that effect.

Q. And he said it again in 1982, that Reynolds should stick with its conventional products as long as it could; true?

A. I don't know, if you'll point me to a document we can look at it.

Q. All right. 1773, it's the Nordine document. It's the very last paragraph.

"Clearly, we will remain in the conventional cigarette business as long as we can. But I believe in view of the Nordine study and other information we need to bring to -- to very -- we need to begin to very seriously think about where we go, if and when that market disappears. There are some long-term, high risk cost things that need to be addressed because, to repeat, we cannot be comfortable marketing a product which most of our customers would do without if they could".

So, you would agree that back in 1968, 1969, up to today, Reynolds has not marketed a safe cigarette, have they?

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A. A safe cigarette? There is no safe cigarette. The answer is yes. Have we marketed safer cigarettes? The answer is absolutely yes. In my opinion there's adequate evidence that we have marketed cigarettes that are reduced risk. Are they safe? No. If somebody wants to completely eliminate the risks of smoking they must stop smoking.

Q. But Reynolds waited until 1982 to even begin to develop, '81, '82 to develop the Premiere, true?

A. In 1981 or '82, in that timeframe there were several things coming together that ultimately lead to the development of Premiere. So in that sense, that's right.

The -- however, there were a number of other things looked at prior to that, and of course as we've already talked about the general reduction and selective reduction had been going on since the '50s. But as you can see even see as evidenced by Dr. Teague, there was a lot of thinking of other approaches that one could take to reduce the risks of smoking.

Q. One of the things that happened was that there was no longer any support for a low tar, low nicotine cigarette from the National Cancer

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Institute back in the '70s, I think you testified
that for political reasons they did away with that?
A. Well, I think, once again you're
completely turning around my testimony.
In the case of the NCI-TWG, I will go through this once again. The NCI-TWG was terminated for purely political reasons in the late '70s. The purely political reasons was because the government was trying not to develop low tar, low nicotine cigarettes. They were trying to evaluate the various construction variables, like reconstituted tobacco, expanded tobacco and they were trying to see if they really made a difference in the biology, in the chemistry. And this was essentially basic research that the government was engaged in with the industry and together with people from the public health community and elsewhere.
In the late '70s, the government decided what we really need to do is we really need to convince people to stop smoking. And smoking safer cigarettes is not what we want them to do, we want them to quit completely. That's the only acceptable end point. And as a result they shut down the NCI, TWG program. But to suggest that the NCI, TWG was only interested in lower tar, lower nicotine,

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that wasn't correct at all.

Q. It was after that point that you started developing Premiere?

A. Well, the NCI, TWG group was terminated in the late '70s. We began Premiere in '81, '82. There's no connection between those two, between those two facts.

MR. ACOSTA: That's all I have for you, Dr. Townsend.

THE COURT: Ms. Parker.

MS. PARKER: Your Honor.

THE COURT: Redirect?

MS. PARKER: May I have a few minutes to move the easel over, to set up our computer?

THE COURT: You may. I'll tell you what, ladies and gentlemen, that will probably take few minutes. Why don't we take a 15-minute break.

(Whereupon, the jury was excused at 2:18 p.m.)

THE COURT: You're still testifying. We'll be in a 15-minute recess.

(Thereupon, a recess was had from 2:19 p.m. until 2:35 p.m.)

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THE BAILIFF: All rise. Court is now back in session.

THE COURT: You may be seated.

Are you ready, Ms. Parker?

MS. PARKER: (Nods head)

THE COURT: Mr. Acosta?

MR. ACOSTA: Yes, Your Honor.

THE COURT: Very good.

Bring the jury in.

THE BAILIFF: Yes, sir.

(Thereupon, the jury returned at 2:40 p.m.)

THE BAILIFF: All rise.

THE COURT: You may be seated.

Ms. Parker, you may proceed.

MS. PARKER: May it please the Court.

Good afternoon, ladies and gentlemen.

REDIRECT EXAMINATION

BY MS. PARKER:

Q. Afternoon, Dr. Townsend.

A. Good afternoon.

Q. You were asked questions by Mr. Acosta Tuesday, Wednesday, and all of today until now. Of all the questions that he asked you, did Mr. Acosta ask you even a single question about Floyd Kenyon?

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A. No.
Q. And of all the documents that Mr. Acosta showed you, did he show you even a single document that you had written in your 24 years that you've been at the company?
A. No, he didn't.
Q. All right.
MS. PARKER: Your Honor, may I ask the witness to step down and write on the easel here for me?
THE COURT: You may.
BY MS. PARKER:
Q. Dr. Townsend, I'm going to show you or hand over to you some of these exhibits that you were given by Mr. Acosta. And I'm going to ask, if you will, just to go through here and put the date. You can just put the year over on this side?
A. On the left hand side?
Q. That will be fine, just over here.
And if you'll look through them as you do it. Let me just ask you generally if these are all -- can you tell us whether these are all documents that Mr. Acosta showed you and then he asked you questions about whether or not there's a link between lung cancer and smoking as you go

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through there, all right?
A. (Witness complies)
Q. Okay. Can you tell us are these documents Mr. Acosta showed you, and I'm going to ask you questions with whether there's a link between lung cancer and smoking?
A. Yes.
Q. During this -- if you'll just tell the jury generally what period of time we're talking about here? '50s?
A. Well, throughout the '50s and then the early '60s.
Q. During that period of time do you know whether the medical and scientific community had any statements or issued any statements about whether or not the public should be warned about health risks of smoking during that time period?
A. Yes, I do know.
Q. And how do you know that?
A. I know that from documents in the R.J. library.
Q. All right. Have you checked Reynolds library and files to see what's in there with respect to what the medical and scientific community was saying during this period of time about whether or

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not warnings or needed?

A. Yes, I've looked at R.J.R. files to see what was said about lung cancer.

MS. PARKER: Your Honor, if I could pull up at this time AN-29, please.

THE COURT: AN-29 is an exhibit?

MS. PARKER: If could you pull up the date, please, so they can see the date.

BY MS. PARKER:

Q. Dr. Townsend, if you will, if you'll write the date, just the year is fine. Just write that up there.

A. On the right hand side?

Q. That will be great. Maybe you can draw the lines between the two.

Okay. If you pull up the highlighted portion.

And is this information or a statement that's in Reynolds' files?

A. Yes.

Q. Okay. If you could read to the jury, please, the highlighted portion.

A. "AMA, means the American Medical Association: No conclusive proof.

Dr. Walter B. Martin, president of the

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American Medical Association said there was no conclusive evidence that -- that smoking caused cancer of the lung.

I don't think the evidence is great enough in this cigarette versus lung cancer problem to warrant the AMA's advising people not to smoke."

Q. Thank you. Do you know whether the American Cancer Society issued any kind of statement during this period of time?

A. Yes, I do.

Q. All right. If you could, pull up number AIW-250, please.

First if you could pull up the date.

And Dr. Townsend, if you would, just right that date -- I know it's hard to see, but can you tell it's 1956?

If you could pull up that quote.

If you could read that for the jury.

A. "American Cancer Society has resolved to support as its resources permit, research efforts to identify whatever cancer inducing substances might may be in tobacco and its products. And to find the means of eliminating them. In the meantime, it is committed to setting the facts as they stand today and as they accumulate before the people, all the

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people, in this country. It does not hold that smoking" -- and I can't read that word. Smoking -- "it does not hold that smoking causes cancer of the lung. It does not propose to tell the people not to smoke."
Q. And during this time period here, 1953 to 1962, did the Surgeon General of the United States issue any type of statement with respect to this issue?
A. Yes, he did.
Q. And again, is that information or statement in Reynolds library and files?
A. That is in the R & D library at Reynolds.
MS. PARKER: Your Honor, if I could ask if we could pull up AIW-3641, please, and this has been pre-admitted?
THE COURT: You may.
BY MS. PARKER:
Q. If you could put the date over, please. And then I'm going to ask you if you will to read what's on the screen for the jury.
A. "Surgeon General Bernie: Our position is that we have informed the public through the excellent coverage of the press, radio, and TV. We

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have informed the official health agencies in the states who are responsible for this area, and we have informed the American Medical Association, recognizing that many people will go to their own physicians for advice.

"In other words, even though I'm firmly convinced that we were right in making this statement at this time, and letting the public know that in our opinion, we believe there is a relationship between excessive and prolonged cigarette smoking, I do not believe that we would be on firm ground in recommending such a warning sign at this time until we have more specific information."

MR. ACOSTA: Your Honor, I have something additional that I'd like to have read under the rule of completeness.

MS. PARKER: If could you hand it up to witness or I'll read it.

THE COURT: Ms. Parker, why don't you -- do you have it for Ms. Parker to read?

MS. PARKER: I'll just read this: "Mr. Blatnick, doctor, the British we understand are circulating posture through local health authorities, samples of which are included in the July 26 issue of U.S. News and

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World Report accompanying your interview Dr. Haller on the truth about smoking and cancer, see appendix, Exhibit 9, page 558, would that be a proper function of the government in view of the concerns expressed here as to the seriousness of smoking?"
"Dr. Bernie, I don't believe so, Mr. Chairman."
BY MS. PARKER:
Q. All right. During this period of time did the National Cancer Institute issue any type of statement or opinion about this same issue?
A. Yes, it did.
Q. And is that information that is in Reynolds library or the files?
A. It is in the R & D file.
MS. PARKER: If we could pull up AIW-280, Your Honor?
THE COURT: You may.
MS. PARKER: If you could put the date, please.
All right. If you could pull up the quote.
BY MS. PARKER:
Q. Dr. Townsend, if you could read that

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for the jury, please.

A. "London, July the 7th. The United States government needs more evidence before deciding whether to warn against cigarettes as the British government has done, world cancer experts were told today.

The John. R. Haller -- Dr. John R. Haller, director of the National Cancer Institute, Bethesda, Maryland, made the point in an address prepared for delivery before the seventh International Cancer congress here."

Q. All right. Thank you. You can pull that one down.

In 1964 did the American Medical Association issue any type of statement regarding this issue of smoking and lung cancer?

A. Yes.

Q. And is that information in Reynolds library or files?

A. Yes, it is.

MS. PARKER: Your Honor, if we could pull up AS-321, please.

THE COURT: You may.

Q. Pull up the date.

Thank you.

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If you could pull up the quote.

BY MS. PARKER:

Q. Dr. Townsend, if could you read that for the jury, please?

A. "With respect to cigarettes, cautionary labeling cannot be anticipated to serve the public interest with any particular degree of success. The health hazards of excessive smoking have been well publicized for more than 10 years and are common knowledge.

Labeling will not alert even the young cigarette smoker to any risks of which he is not already aware."

Q. All right, thank you. You can take that down.

Dr. Townsend, how do the dates in these Reynolds documents on this side of the chart compared with the dates of documents we've just read to the jury?

A. Well, they're pretty much the same. They span through the '50s into the early '60s.

Q. Okay. Thank you. Your Honor, he can go ahead and take the stand?

THE COURT: He may.

BY MS. PARKER:

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Q. Dr. Townsend, you were asked questions by Mr. Acosta, about the definitions of addiction. And I want to ask you if you are familiar with the definition of addiction in the 1964 Surgeon General's report?

A. Yes, I'm familiar with it. I'm certainly not an expert in the area of addiction, but I am familiar with it.

MS. PARKER: Your Honor, may we display that?

THE COURT: You may.

BY MS. PARKER:

Q. Dr. Townsend, I'm going to ask you if you will read that, please.

A. "Distinction between drug addiction and drug habituation.

Smokers and users of tobacco in other forms usually develop some degree of dependence upon the practice, some to the point where significant emotional disturbances occur if they're deprived of its use. The evidence indicates this dependence to be psychogenic in origin. In medical and scientific terminology the practice should be labeled habituation to distinguish it clearly from addiction, since the biological effects of tobacco, like coffee

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and other caffeine containing beverages, the tell morsel chewing and the like, are not comparable to those produced by morphine, alcohol, barbiturates, and many other potent addicting drugs."

Q. Thank you. Dr. Townsend, how long has that definition been the definition of the United States Government?

A. It was the definition up until the 1988 Surgeon General report when the Surgeon General decided to change the definition.

Q. All right. Now, regardless of what label you use, regardless of whether it's called habit or addiction, or whatever, can people quit smoking?

A. Absolutely. As I've already testified, more people have quit smoking than currently smoke. I think the Surgeon General estimates it somewhere in the neighborhood of 50 million people are former smokers. People who have quit completely. Where there are probably in the neighborhood of 40 million people who currently smoke. So is it possible? The answer is absolutely yes. Can it be difficult for some people? You bet.

Q. Did Mr. Kenyon quit smoking?

A. Yes, he did.

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Q. And on behalf of Reynolds, let me ask you, are you aware that the plaintiffs do not have a claim for addiction in this case?

A. I am aware of that.

Q. All right. Now you mentioned I believe you just said -- well, let me ask you again, how many Americans have quit smoking?

MR. ACOSTA: I object to the last question, Your Honor, move to strike.

MS. PARKER: I asked him if he was aware?

THE COURT: I'll overrule, go ahead.

MS. PARKER: Thank you, Your Honor.

BY MS. PARKER:

Q. How many Americans have quit smoking?

A. The Surgeon General's estimated about 50 million have quit.

Q. Do you know how many of those 50 million quit smoking without any assistance of any kind?

A. Yes. The Surgeon General also has estimated between 90 and 95 percent of the people who have quit, of that 50 million have quit without any assistance from any source.

Q. And to your knowledge has Reynolds ever

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denied that cigarette smoking is a habit?
A. No.
Q. Okay. And to your knowledge has Reynolds ever denied that it may be difficult to quit smoking for some people?
A. Of course not. That's really common sense, I believe.
Q. Now, with respect to the documents that Mr. Acosta showed to you from other tobacco companies, from Philip Morris, from Brown & Williamson, British American Tobacco Company, have you ever seen any of those documents outside of litigation?
A. No. No, I haven't. The only time I've seen them is in courtrooms like this.
Q. Are any of those documents from Brown & Williamson or Philip Morris or British American Tobacco Company that Mr. Acosta showed you, are any of those in Reynolds research and development library or Reynolds files?
A. I don't believe they are. You know, I haven't done an exhaustive search of all Philip Morris, and BAT, and British American, but I can't recall finding a single one in our files.
Q. Let me switch gears and ask you,

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Mr. Acosta asked you -- I think this was back on Tuesday, about scientists that you testified about who was at Reynolds by the name of Don deBethizy?

A. Right.

Q. You know Dr. deBethizy?

A. I know Dr. deBethizy very well.

Q. Okay. And Mr. Acosta asked you this question: And "Dr. deBethizy admitted that some smokers cannot stop smoking."

Do you recall that question?

A. I recall it very vividly because I don't believe that Don deBethizy would have said that based on my knowledge what he believes and understands about science.

MS. PARKER: Your Honor, may we display Exhibit AS-811, which is the monograph that Mr. Acosta has used when he was asking questions of Dr. Townsend?

THE COURT: You may.

MS. PARKER: Will you pull that up, please.

BY MS. PARKER:

Q. Dr. Townsend, could you read for the jury what Dr. deBethizy really said at that NCI conference?

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A. Yes. "Attributed to Dr. deBethizy: I would not be surprised at that because the Surgeon General said in 1981 that if you reduced your tar intake, you reduce risk. It has been communicated pretty clearly that if you can not stop or are unwilling to stop, then reducing your tar intake is a good idea."

Q. Did Dr. deBethizy ever say that some smokers cannot stop smoking?

A. I've never heard Dr. deBethizy say that.

Q. All right. Now Mr. Acosta asked you some questions about this nicotine research, do you recall that?

A. Yes.

Q. I want to ask you, what is Targacept?

A. Targacept.

Q. Can you tell the jury what Targacept?

A. Targacept is actually a company that we recently spun off from R.J. Reynolds and it's now -- it's now an investor owned company. Reynolds still owns a significant share of this company.

Targacept is actually the -- the head of Targacept is actually Dr. deBethizy. Because Dr. deBethizy and a number of his researchers were

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studying nicotine and how nicotine behaves in the body, you know, about nicotine receptors, some of the things we've already talked about here.

And one of the things that spun out of that research is that nicotine type compounds, compounds that are similar to nicotine and nicotine itself, has some positive affects on Alzheimer's and other psycho degenerative diseases. And so deBethizy and his scientists began working on analogs, compounds that are similar to nicotine and have the -- and have the beneficial effects on Alzheimer's and Parkinson's disease, but don't have some of the peripheral vascular affects that nicotine itself does.

So they started inventing new compounds that are similar to nicotine for the treatment of Parkinson's and Alzheimer's disease. When it got to a certain point, a number of investors started investing in this company when we spun it off. And in fact, they've got investors from around the world, large -- large investment.

Q. Who -- who -- tell us again who is the head of Targacept?

A. Dr. deBethizy.

Q. And did he start that work while he was

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at Reynolds or is that something that he started after he got to Targacept?

A. No, he started that while he was at Reynolds. In fact, that work carried on for a number of years until it got to the point that it looked like it really was going to work. At that point Reynolds decided to spin it off into an investor owned company. I think Reynolds still owns -- retains about 43-percent ownership of the company. And private investors own the other 60 percent.

Q. All right. Thank you. I'm going to ask you just a few questions now about a lot of information that Mr. Acosta asked you about, so I'm just going to go kind of one by one through this.

First of all, let me pull up page 160 of the 1989 Surgeon General's report. And this is a chart that Mr. Acosta showed you, I think, I think it was back on Tuesday.

If you could blow that up, please.

Do you remember seeing that chart?

A. Yes, I remember that.

Q. Okay. Does that reference there to active smoking, does that apply to Mr. Kenyon?

A. No, Mr. Kenyon has quit smoking.

Q. All right. Thank you. You can take

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that down.

Now, do you recall -- do you -- can you tell us whether or not Mr. Acosta asked you questions about filter cigarettes in the 1950s?

A. Yes, he asked me a number of questions.

Q. Okay. Did Mr. Kenyon smoke filtered cigarettes in the 1950s?

A. No, he didn't.

MS. PARKER: And then let's pull up AS-995, and this is a Reader's Digest article that Mr. Acosta showed you.

And he read you this quote from Dr. Alvin Barac of New York. "It says a witness for a cigarette manufacturer, I don't believe, cigarette smoking produces any damage with respect to the lungs, et cetera."

Is this gentleman, Barac is he a scientist at Reynolds?

A. No, he's not.

Q. Has he ever been a scientist at Reynolds?

A. Never has been.

Q. All right, sir, thank you. Mr. Acosta asked you -- he showed you some documents and asked you some questions about TIRC. Then he said the name

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of that organization had changed to CTR, do you recall that?

A. Yes.

Q. Did Mr. Acosta show you any documents from Reynolds on the subject of TIRC or CTR?

A. No, he didn't.

Q. Okay. Now Mr. Acosta asked you some questions about FDA regulations. And he held up this -- this book he has here on his table there. Are those regulations valid and in effect?

A. No, they're not. Reviewed by the U. S. Supreme Court in a review by the Supreme Court. The Supreme Court threw those regulations out.

Q. All right.

MR. ACOSTA: Your Honor, I object, that misstates what occurred and I object to the question and the answer, move to strike.

THE COURT: All right.

MS. PARKER: Your Honor, I'll follow up.

THE COURT: Just approach for a second.

(Thereupon, the following bench conference was had:)

MR. ACOSTA: Your Honor, I never asked about regulation, I asked about study.

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THE COURT: I understand. Here's the problem, is you did hold up the book, okay. But I'm going to sustain the -- I think the appropriate response is those regulations are not in effect, period. Don't get into anything else. Just ask a leading question.

MR. ACOSTA: He's already answered that and I object to her asking it again.

THE COURT: All right. Then -- what -- Ms. Parker -- I was going to sustain and have her reask it. You just want me to leave it like it is? All right. I'll leave the pending answer, if you want me to do that.

MR. ACOSTA: I guess I don't understand my option.

THE COURT: I was going to sustain, because I don't think the Supreme Court has anything to do with it.

MR. ACOSTA: Then she's withdrawing her question?

THE COURT: I think the only thing -- the appropriate thing to say is the regulations not in effect, period. I was going to let her ask a leading question -- the regulation.

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MR. ACOSTA: That's as far as you can go.

MS. PARKER: Do you want to leave it like it is?

THE COURT: Or do you want to leave it like it is and move on?

MR. ACOSTA: If she just moves on, that's fine.

THE COURT: All right.

(Thereupon, the bench conference was concluded.)

THE COURT: All right. Ask the next question.

BY MS. PARKER:

Q. All right. Dr. Townsend, do you recall -- may I hold this up, this book?

MR. ACOSTA: Yes.

BY MS. PARKER:

Q. Do you remember -- do you recall Mr. Acosta showed you this purple book and asked you some questions from one of the chapters in there?

A. Yes.

Q. And in particular, did he ask you and put on a screen an article by Jack Henningfield, do you remember that?

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A. Yes.
Q. Can you tell the jury who is Jack Henningfield?
A. Jack Henningfield was formerly at the National Institute of Drug Abuse. I think he's currently at Henning & Associates in Washington. He's a very outspoken tobacco control advocate. And is in fact a witness for many plaintiffs in various lawsuits.
Q. Do you know whether or not Jack Henningfield had any relationship with -- he stepped out now, Greg Maxwell who is the lawyer -- who was sitting here in the middle earlier today?
A. I think Mr. Maxwell's firm has retained Jack Henningfield.
MR. ACOSTA: Judge, I object on relevance grounds.
THE COURT: Well, I'll sustain.
MS. PARKER: Goes to his credibility.
THE COURT: Go ahead. Well --
MR. ACOSTA: I object to that statement and --
THE COURT: Hold on.
MR. ACOSTA: -- move to strike that.
THE COURT: Yeah, no extraneous

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comments.

BY MS. PARKER:

Q. You were asked some questions by Mr. Acosta about p53 mutations, do you remember that?

A. Yes.

Q. Do you know whether or not Mr. Kenyon's pathology was ever tested to see whether or not Mr. Kenyon had a p53 mutation?

MR. ACOSTA: Your Honor, I object, this is beyond --

THE COURT: I'll allow that question.

THE WITNESS: Yes, I know. I said, "Yes, I know."

BY MS. PARKER:

Q. Can you tell the jury?

A. Mr. Kenyon's -- Mr. Kenyon was not examined for p53 mutations.

Q. All right. Now, you were asked some questions also about cigarettes that were marketed by Philip Morris. And you were asked some questions about whether they had zero nicotine or virtually no nicotine. Do you remember that line of questions?

A. Yes.

Q. All right. Can you tell us the names of the Philip Morris cigarettes that you're talking

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about?

A. Sure. This goes back to the early 1990s when Philip Morris marketed a de-nicotinized cigarette essentially and they used, if you remember the technology used for decaffeinating coffee. And they marketed a number of cigarettes in the early '90s called Merit, de-nic, Merit, de-nic and then there were several styles of that full-flavored, lights, ultra light. There was a product called Next and there were a number of styles of that. And there was some styles of Benson & Hedges had the de-nicotinized tobacco in it.

Q. Just to be clear, did those cigarettes have nicotine in them or not?

A. They did have nicotine.

Q. How do you know that?

A. From the Federal Trade Commission Tar and Nicotine report.

MS. PARKER: Your Honor, I would like to display that. It's AN-1499 please.

THE COURT: You may.

BY MS. PARKER:

Q. Pull it up. And if you could just tell the jury what that is on the first cover there?

A. This is cover page of the annual

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Federal Trade Commission report on tar and nicotine and carbon monoxide yields from all cigarettes in the United States.

Q. All right. And if you could pull up just those references.

All right. Can you read for the jury that line, and explain what that means.

A. B and H stands for Benson and Hedges. Of course de-nic is de-nicotinized, meaning the tobacco was processed to remove a fairly large portion of the nicotine. It's a King size cigarette. It has a filter. This particular one is a hard pack, that's what HP is. This one is also a menthol product. So it's a King size filter, hard pack menthol lights. A lights product. Light category.

The next column over is the O9. That's 9 milligrams of tar per cigarette. And 0.1 milligrams nicotine per cigarette.

Q. All right. Let's pull up the next screen please.

If you could tell the jury what that means?

A. This is an example of Merit de-nic, one pick style. It's also King size filter. This happens to be in soft pack.

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If you go further over, this is 8 milligrams tar per cigarette and also .1 milligrams nicotine per cigarette.

Q. All right. And I believe there's one more screen.

If you could read that line to the jury and explain what that means.

A. This is the product called Next, happens to be -- this is one style highlighted, it happens to be King size filter, soft pack, menthol, low tar. And the tar -- the tar yield is 7 milligrams per cigarette, the nicotine yield is .1 milligrams per cigarette.

Q. So how much nicotine were in these Philip Morris cigarettes?

A. All of them -- all of them were .1 milligrams per nicotine -- per cigarette.

Q. All right. Let me switch topics. Mr. Acosta asked you some questions about what he called compensation, when smokers switch from floor flavor to low tar. Did Mr. Kenyon ever switch from full flavor cigarettes to low tar cigarettes?

A. No, he didn't.

Q. Did Mr. Kenyon ever smoke a low tar, low nicotine cigarette?

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A. No, he didn't.
Q. Can you tell the jury why did Reynolds do research and try to develop a lower tar, lower nicotine cigarette?
A. A lower tar, lower nicotine?
Q. Uh-huh. (Indicating affirmatively)
A. The main goal of developing lower tar, lower nicotine cigarettes is to -- is to provide cigarettes that -- that may reduce the risks of smoking. And it's because -- for two reasons we did that, one is because going after safer cigarettes in whatever variety or version, whether it's a Russell type or low tar, low nicotine, or a Premiere or Eclipse, going after low tar cigarettes and trying to make consumer acceptable cigarettes, is the right thing to do.
The second thing is consumers, there are a number of consumers out there who really would like the consumer acceptable reduced risk cigarette, you know, if one's developed and given to them.
Q. Did the medical and scientific community issue any type of statement or recommendation with regard to developing a cigarette with lower tar and lower nicotine?
A. I think for many years the public

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health community, the government, various governments, have called for lower tar and lower nicotine as a way for smokers to reduce their risks.
Q. All right. Do you know whether the United States Public Health Service, ever issued such a recommendation you just described?
A. Yes, I do know that.
MS. PARKER: Your Honor, I would like to pull up AS-273 at this point?
THE COURT: You may.
BY MS. PARKER:
Q. And Dr. Townsend if you could just describe what this is for the jury and --
A. This is from the congressional record. It's dated July 21, 1966 to August, 1966. Pages 16539 to 17998.
Q. If you could just tell the jury that name?
A. Mr. Newsome.
Q. I think it's Magnason. It's hard to see now that it's put back down. That it.
A. Magnason.
Q. All right. All right, I'll ask you if you will read that to the jury.
A. "At the close of the meeting, the

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following statements were adopted unanimously by the group, and addressed to the Surgeon General: The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful are the effects.

2. We recommend to the Surgeon General that actions be encouraged which will result in the progressive reduction of the tar and nicotine content of cigarette smoke".

Q. All right, thank you.

Now Dr. Townsend do you know whether back in 1970, the Federal Trade Commission said anything about the issue of "having cigarettes with lower tar and nicotine"?

A. Yes, the FTC did.

MS. PARKER: Your Honor, may I display AN-550 at this time?

THE COURT: You may.

BY MS. PARKER:

Q. If you could identify that, Dr. Townsend, please.

A. This is the Federal Trade Commission report to Congress in 1970.

Q. And if you could pull up the quote. Could you read that for the jury, please.

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A. "Thus the regulatory problem presented by these figures is that responsible medical opinion indicates that the reduction of tar and nicotine content in cigarette smoke decreases the hazard to the health of that element of the population which persists in smoking cigarettes. And the bulk of those varieties which are at the low end of tar and nicotine scale are filter varieties. To promote the public interest, advertisers should not be discouraged from promoting those varieties which rank low in tar and nicotine".

Q. All right, thank you.

Now you've talked some about Dr. Wynder and Dr. Hoffman. If you could just remind us briefly who those two gentlemen are.

A. Well, actually Professor Wynder was the scientist who developed -- or who conducted the first successful mouse skin painting study with cigarette smoke when he was at Washington University in St. Louis. He later went on to Sloan Kettering and worked with Dr. Hoffman, and actually both of these scientists have pretty much devoted their life to the study of cigarette smoke chemistry and cigarette smoke biology.

They both then went on to the American

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Health Foundation. Dr. Wynder actually formed the American Health Foundation. Dr. Wynder recently died and Dr. Hoffman is still there. But again they've devoted their life's to the study of cigarette smoke and the risks.

Q. Did Dr. Wynder and Dr. Hoffman write a book that addressed the issue of lower tar, low nicotine cigarettes?

A. They did. They wrote a very comprehensive book. I think it was published in 1967.

MS. PARKER: Could you pull that up please. Your Honor may we display AN-564?

THE COURT: You may.

MS. PARKER: Yes, if you could pull that up please. In you could pull up the quote.

Q. And Dr. Townsend if could you read that for the jury please.

A. "The manufacturer should be encouraged to produce cigarettes with increasingly lower tar and nicotine yields".

Q. Thank you.

Now did the American Cancer Society back in the -- well, 1976, make any type of statement

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or recommendations with respect to lower tar, lower nicotine cigarettes?

A. Yes, the American Cancer Society did.

MS. PARKER: Okay, Your Honor, may we display AN-544.

THE COURT: You may.

BY MS. PARKER:

Q. And if you could just tell the jury the date there?

A. This is September 27th, 1976.

Q. If you could display the quote please.

A. It says "lower tar, lower risk.

Does the smoker who switches to lower tar, lower nicotine cigarettes reduce his risk of lung cancer and heart disease? Excuse me. The answer, according to a report from the American Cancer Society last week is a qualified, yes. In the first definitive study of its kind, ACS statisticians found that the low tar and low nicotine cigarette brands are really safer than the stronger ones, but the safest course by far is not to smoke at all".

Q. Thank you.

Now, Dr. Townsend are you familiar with Dr. Cuyler Hammond of the American Cancer Society?

A. Yes, I am.

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Q. Can you tell the jury who he is?
A. He was Director of the American Cancer Society. He's also probably one of the prominent researchers in the area of cancer. Well, well-known cancer researcher.
Q. Did Dr. Hammond make any type of statement or recommendations back in 1980 about reducing tar in cigarettes?
A. Yes.
MS. PARKER: And Your Honor, may we display AS-115?
THE COURT: You may.
MS. PARKER: Thank you.
BY MS. PARKER:
Q. Pull that up.
Just tell the jury the date there.
A. 1980.
Q. All right. Could you just read that quote please for the jury.
A. All right. The title is; The Long-term Benefits of Reducing Tar and Nicotine in Cigarettes.
"Sometime in the early 1960s, the first committee meeting ever on the subject of less harmful effects of low tar, low nicotine cigarettes was convened in Washington. At this meeting, Ernst

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Wynder and I drafted a resolution that was approved by the committee and was quoted in the congressional record and by the Surgeon General. It said, 'The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content in cigarettes, the less harmful would be the effects' (U.S. Congress 1967).

This statement has been relevant ever since -- ever since. Today I would change this wording. Instead of saying that the preponderance of scientific evidence strongly suggests, I'd now say the preponderance of scientific evidence very strongly suggests and I'd leave the rest of the wording unchanged".

Q. All right. Thank you. Dr. Townsend, did the Surgeon General back in 18 -- 1989, 1989, did the Surgeon General issue any type of statement or recommendation about lower tar, lower nicotine cigarettes?

A. Yes, he did in the '89 report.

MS. PARKER: All right. Your Honor, may we display AS-39 please?

THE COURT: You may.

MS. PARKER: If you would pull that up please.

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Q. If you could read that quote for the jury please.
MR. ACOSTA: Could I have the page please.
MS. PARKER: 44.
THE WITNESS: "More recent studies continue to document lower risks in smokers of filter cigarettes compared to the smokers of non-filtered cigarettes".
Q. All right. Thank you. Now Dr. Townsend, are these recommendations that we've gone over on the screen, are these the only statements made by the government or the public health community about lowering tar and nicotine in cigarettes?
A. No, they're by far not the only statements. There are many, many, many statements, you know, from the public health community, public service announcements, official reports from scientific organizations. There are many, many recommendations that if one wants to reduce the risks of smoking, moving to lower tar, lower nicotine cigarettes, is a good step in that direction.
Q. And in your opinion as a cigarette designer, based on your experience at Reynolds, has

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Reynolds followed through on all these recommendations made by the public health community and the government?

A. We have followed through on the recommendations and frankly we've been successful. If you'll remember in the testimony back on Monday, I guess it was, in my testimony, I'd indicated that we had reduced the tar -- the tar levels from the high '30s, an average of about 38, down to today an average of about 12. And that's about a 66, 67 percent reduction overall in the tar level.

And that represents, I think, a significant reduction in the risk to smokers in this country.

Q. Is that one of the charts that you showed the jury on Monday?

A. Yes, it is.

Q. If you -- I won't pull the chart out, but if you could just describe to the jury which one of the charts you're referring to.

A. It was the chart of sales weighted averages. You remember there were two curves. It started in 1954 and showed tar level at about 38 milligrams and then went down to -- to recent times where it dropped to about 12 milligrams.

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And then the second was -- the second curve underneath it was the nicotine level, which went from about 2.8 or thereabouts milligrams per cigarette down to about .9 today. So two curves, it was titled "sales weighted average, tar and nicotine".

Q. All right. Now I'm going to pull up at this point with Your Honor's permission Exhibit 693.21 that Mr. Acosta showed this afternoon.

THE COURT: You may.

BY MS. PARKER:

Q. Do you remember being asked questions about this drawing here?

A. Yes, I do.

Q. All right. And that was from Dr. Teague; is that right?

A. This is one of Teague's articles, yes.

Q. I want to ask you for both of these drawings here, are these feasible safer alternative designs that are superior to the designs that -- to the cigarette designs for the cigarettes that Reynolds actually manufactured and sold?

A. As a cigarette designer and a product developer, I don't regard either of these as feasible alternative designs. They're ideas that Dr. Teague

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put on paper that have never been reduced to practice, number one. Valuated for their performance characteristics, demonstrated to be commercially feasible. So they're ideas.

Q. Now, did Reynolds wait until the 1980s when it started developing Premiere to try to develop a safer cigarette?

A. No. We've had many projects well before the '80s, because in parallel to -- in parallel to our general reduction and selective reduction and the general reduction we talked about has been largely -- has been really successful. The selective reduction has had some success, but has been more difficult.

In addition to that we've had other approaches to safer cigarettes, like the XG, GT and other approaches at trying to make reduced tar, medium nicotine cigarettes. And also we've had a lot of work trying to develop more unconventional cigarettes, too. There have been a lot of ideas, some crazy, some a little more practical that pop up from our scientists because we're -- we're always looking for ways to reduce the risks. And that work has gone well, well -- much earlier than 1980 and 81.

Q. I just have a couple more questions.

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Mr. Acosta asked you some questions about what's the proof, that's the word he used, what's the proof about the relationship between smoking and lung cancer? And some words were used, I want to ask you to explain to the jury what those are.

The classical definition of cause was one term that was used. Another term that was used was the new relaxed definition. Can you tell the jury what those terms mean.

MR. ACOSTA: Your Honor, I need to object to the form of that question. I think that misstates the question that I asked the doctor.

THE COURT: I'll overrule. If you understand you can answer.

THE WITNESS: Yes, I do.

There are really two -- two extreme approaches to whether or not -- to deciding whether or not cigarette smoking causes cancer. The classical definition of causation or the classical proof level of causation, which has been in place up until fairly recently, in the scientific community, I'm talking about scientific proof, is you need to have epidemiology that says; yeah, this is

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statistically related to that. Lung -- cigarette smoking is related to lung cancer. You need to have some reasonable chemical evidence of why that may be or biological evidence. So there needs to be some additional evidence that supports the theory.

And very importantly, you need an animal model where you can go in the laboratory with animals, administer or expose the animals to cigarette smoke, and see lung cancer. That model is -- has never been demonstrated reproducibly. There is no animal model test where you can expose animals to cigarette smoke and they reproducibly get lung cancer. So classically that's been one requirement.

Another requirement classically has been understanding the mechanism. Well, if you know this happens and everything else fits so far, why does cigarette smoke cause lung cancer? And getting into the mechanism of how that can happen. So you see it's a fairly high bar to demonstrate -- to demonstrate causation. And it's very tough. And it's the animal model that's been missing and the

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mechanism that's been missing to date that causes some scientists to say not that cigarette smoking doesn't cause it, but that there's not enough information to -- to decide that cigarette smoking does in fact cause lung cancer.

It may. It very -- it may be more probable than not. But there's not enough using that classical definition.

Using the more modern definition I think many scientists have concluded that cigarette smoking does cause lung cancer because the epidemiology is very strong from. The epidemiology the statistics, lung cancer is -- I'm sorry, cigarette smoking is a very strong risk for developing lung cancer. So the statistics are strong.

In addition to that, people have done a lot of laboratory experiments. You can see DNA damage on exposure to lung cancer even though you don't form tumors. You can see irritation in the airways of certain types of animals, even though you don't see tumors. And all that evidence pulled together is consistent with a conclusion that -- that

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smoking causes cancer, but it doesn't fit the classical definition. And that's where most scientists are today in the public health community and the government. And frankly there are a number in my laboratory as well who accept this more relaxed definition, or the more modern definition, I prefer to call it.

Q. Dr. Townsend, if you could tell us what do these definitions mean in terms of Reynolds cigarette design efforts?

A. Whether you accept one definition or another, it makes no difference in terms of what we do at Reynolds in cigarette design.

Q. Why is that?

A. Because we've chosen to -- to assume that cigarette smoking in fact does cause -- does cause cancer. And -- and with that assumption we then set about trying to figure out, well, what's in cigarette smoke that we could remove, that would reduce the risks? How can we show that through biological tests, whether it's skin painting or laboratory test tube studies. But regardless of which -- which criteria you use for deciding on causation, the fact is our operating premise has been

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to assume that it does. And to -- to do everything we can to reduce the risk of smoking.

MS. PARKER: Thank you.

Your Honor, I have no further questions of Dr. Townsend.

THE COURT: Ladies and gentleman, do you have any questions? If so raise your hand. We have one. Okay. Ask Sylvia to go over. (Handing question to the Court)

Counsel, just come forward.

(Thereupon, the following discussion was had at the bench out of the hearing of the Jury:)

THE COURT: Any issue on that?

MS. PARKER: No.

THE COURT: Read that in.

MR. ACOSTA: What's -- okay.

MS. PARKER: Apparently just remind you about this, that's next.

THE COURT: And then we're done for the day.

MS. PARKER: We have no witness. Need to check.

THE COURT: I was thinking we're done for the day. Just do the videos and be done.

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Okay.

(Thereupon, the bench conference was concluded.)

THE COURT: Dr. Townsend, has there been changes made to the Salem full flavored filters since 1972? And if yes, when?

THE WITNESS: Since 1972?

THE COURT: Yes.

THE WITNESS: The answer is, yes, there have been a number of small changes to Salem since 1972. Because it's an agricultural product there are some small changes in blend to make sure that the product is reasonably consistent, as consistent as possible. And making sure that the tar level and the nicotine level is within the specifications that the numbers that we in fact report to the government. So there have been a number of very small changes.

Also since 1972, the use of air dilution was initiated, I think in 1980. And the tar level of Salem 85, full flavor, which is Salem 85 King size, has declined over time, a bit.

So there has been some reduction.

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There has been the use of air dilution starting in 1980. I think -- well, no expanded tobacco started in 1970. But there have been a number of other changes.

The paper -- the cigarette paper has changed a number of times, changing the permeability of the paper. Generally going to a more porous paper.

So, with the exception of the using of air dilution in the filters, that's been the big change, a gradual decline in tar and nicotine -- not nicotine yield.

THE COURT: Speak to them.

THE WITNESS: I'm sorry. A gradual decline in tar and nicotine yield and a number of very small changes to insure consistency.

THE COURT: I think you may have covered these two, but specifically what about filter ventilation and paper porosity.

THE WITNESS: Yes. Filter ventilation of course was added to Salem in 1980, Salem filter. And the paper porosity has been changed a number of times. Generally going to more porous papers.

THE COURT: And between 1972 and the

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present, what about reduction of BaP?

THE WITNESS: The benzo[a]pyrene level, BaP, in tar is relatively constant. What that means is as you reduce tar you reduce benzo[a]pyrene pretty much to the same degree. So if the -- if the tar level from Salem 85 has been reduced by 10 percent, to a first approximation you will see a 10 percent reduction in benzo[a]pyrene. Because the concentration of benzo[a]pyrene is pretty constant in tar. If you're using general reduction techniques.

So the bottom line is, to the extent tar has reduced in the Salem 85, benzo[a]pyrene is reduced as well.

THE COURT: All right, sir. You're free to step down.

THE WITNESS: Thank you.

THE COURT: Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Ladies and gentlemen, we've got about 30 minutes of videotape deposition. So we can take a break now or just go into that. Does everybody just want to go into that videotape deposition?

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That will conclude our day today. So anybody need a break I guess is another way -- raise your hand.

MS. PARKER: Your Honor, we would call, two depositions but they're very short. As our first witness by videotape, Kathleen Vandy. And we'll go straight from that to our second videotape deposition and that's Ms. Jeanne Fife. And Your Honor may I move that easel.

THE COURT: You may.

And Members of the Jury, the sworn testimony of Ms. Vandy and Ms. Fife, which was given before this trial commenced, will now be played to you by videotape. You are to consider and weigh this testimony as if the witnesses testified here in person.

We're going to display that up here?

MR. BEACH: Yes, Your Honor.

THE COURT: All right. Very good. If for some reason you can't see or hear just raise your hand.

(Thereupon, the videotape was played.)

"THE WITNESS: I do.

Q. Mrs. Vandy, my name is John Yarber and

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as justs mentioned, I represent R.J. Reynolds in a case brought by Florence and Floyd Kenyon and if you would, if you could state your name and business" --

MS. PARKER: We can't hear.

"Q -- address for the record, please.

A. My name is Kathleen P. Vandy. I work at Penn Mutual Life Insurance Company at 600 Dresher Road, Horsham, Pennsylvania.

Q. How long have you been employed at Penn Mutual?

A. Three years."

THE COURT: Put the volume higher please.

"Q Okay, and what is your current title?

A. I'm an attorney in the Law Department.

Q. Okay.

What are your current job responsibilities?

A. Well, as corporate counsel, we handle the day in and day-out functions, legal functions of the company. I, in particular, deal with a lot of Customer Service questions, Claims Department questions. I also handle subpoenas when they come in.

Q. Would you be the person at Penn Mutual

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most knowledgeable about records and able to answer questions today about the records in this case?

A. Yes.

Q. Okay, and is it correct that you are testifying here today in your capacity as Penn Mutual's person most knowledgeable about the records?

A. Yes.

Q. And you were served a subpoena to be at this deposition, correct?

A. That is correct.

Q. And are the records that we have marked as Exhibits 2 through 5 all of the records that you have for Floyd Kenyon?

A. Yes, they are everything we have.

Q. Now, I would like to ask you some questions about Exhibit 2, which is the current policy.

A. All right.

Q. Would all of Mr. Kenyon's current records be kept in that policy, in the file that's marked as Exhibit 2?

A. Yes.

Q. Okay. Would that include correspondence related to the -- to the policy?

A. Yes. The files starts out, as we call

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it, an App. File. It's got the original application and the underwriting that was done on it. Thereafter, if any other correspondence or any other service is provided on the contract, the papers are sent to be attached to the file and there's fiche documentation within the last of couple of years that we started maintaining instead of sending the hard copy, so I checked that when I sent in the subpoena request to make sure that all information that we have available is sent.

Q. And if Mr. Kenyon were to send correspondence to Penn Mutual, would that be kept in the active file, along with the application and other information?

A. Yes. Yes.

Q. Ms. Vandy, if I could just get you to look at the second page of what has been marked as Exhibit 2, and if you could identify what that page is for the record?

A. It's part of the initial application that Mr. Kenyon would have completed when the policy was first taken out.

Q. Okay, and what is the date on that application?

A. Well, there's a -- you mean page 3?

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Q. Yeah, on page 3.
A. There's a date on page 3. Signed on January 10, 1987.
Q. Okay, and who signed the policy?
A. Floyd Kenyon.
Q. Can you just read for the record question 15C asks for on page 2?
A. 'Have you smoked cigarettes at any time during the past 12 months?'
Q. Now, referring to Exhibit 2, if you would like to take a minute to flip through it, is there anywhere in any of the records attached as Exhibit 2 where Mr. Kenyon changed the information about his smoking in response to Question 15C?
A. No.
Q. Anywhere in Exhibit 2, is there a record indicating that Mr. Kenyon was smoking at any time after 1987?
A. No."
MS. PARKER: Your Honor, may I move over there before the next one?
THE COURT: You may.
And the next one is Ms. Fife, correct?
MS. PARKER: Jeanne Fife.
THE COURT: Very good.

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MS. PARKER: Thank you.

"(Witness sworn)

THE WITNESS: I do.

Q. Good morning, Mrs. Fife. How are you today?

A. Fine, thank you.

Q. Ma'am, my name is Geoff Beach and I introduced myself before we began. I represent the defendant in this case, R.J. Reynolds.

Ma'am, we haven't met before, have we, other than my --

A. No.

Q. -- introducing myself this morning.

You're appearing here because you were subpoenaed to appear; is that correct?

A. Yes.

Q. Mrs. Fife, you understand that you have sworn an oath in this deposition to tell the truth to the best of your ability, correct?

A. Correct.

Q. You are Floyd Kenyon sister, correct?

A. Correct.

Q. You and your brother were born and raised together in New York on Long Island by your parents, Frank and Helen Kenyon.

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Is that also correct?
A. That's correct.
Q. It's fair to say, is it not, ma'am, that you have always enjoyed a very close relationship with your brother?
A. Well, what do you mean by 'close relationship'?
Q. Well, ma'am, you would count the relationship that you enjoyed with your brother among the more special of the relationships that you have enjoyed over the course of your life, correct?
A. Yes. We just haven't been close physically, though.
Q. But you have nonetheless maintained a relationship through the telephone and with visiting him from time to time; is that correct?
A. Yes.
Q. Now, ma'am, you recall from the years when you were growing up that your father smoked; is that correct?
A. Yes.
Q. Your mother, however, was a non-smoker; is that correct?
A. That's correct.
Q. And, in fact, isn't it also correct,

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ma'am, that to your knowledge your another didn't approve of smoking?

A. No she did not.

Q. In fact, your mother strongly disapproved of smoking; isn't that correct?

A. That's correct.

Q. And, ma'am, with respect to your brother smoking, do you have any recollection of him smoking in front of your parents when you would be present --

A. No.

Q. -- while he was still at home?

A. No.

Q. You don't have such a recollection; is that correct?

A. That's right.

Q. Now, when you and your brother were youngsters, would your parents permit to you travel to New York City unaccompanied by your parents?

A. How young do you mean?

Q. Age 13, 14?

A. No, they would not permit that.

Q. Now, your mother warned you and your brother about smoking. You recall that, don't you, ma'am?

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A. Yes.
Q. And she warned you that you could get cancer if you smoked, correct?
A. No, she didn't say that.
Q. Do you have any recollection of your mother talking with you about cancer and smoking at all?
A. No.
Q. Ma'am, do you recall being interviewed by representatives of Reynolds earlier this year?
A. Yes.
MR. ACOSTA: Objection to the form.
Q. And do you recall telling them that your mother warned you and your brother about getting cancer from smoking?
A. No, no. That's -- I don't think she knew that people could get cancer from smoking. She just said, 'Don't even start smoking.' She said, 'It's a filthy habit, and you get bad breath.'
Q. Ma'am, do you recall your mother advising you and your brother not to ever start smoking. Is that correct?
A. That's correct.
Q. And she advised you that it was a filthy habit. Is that also correct?

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A. That's correct.
Q. Ma'am, were you present when your mother would also talk to your brother -- talk to both you and your brother about smoking? Do you recall that?
A. I don't remember because it was not a formal discussion. It was just comments you would make now and then. And I don't know whether she spoke to us separately or together.
Yes.
Q. And to your knowledge your father went to a doctor because he was having problems with his throat. Is that correct?
A. Correct.
Q. And to your knowledge your doctor was -- advised that he had polyps on his throat from smoking?
Is that correct?
A. On his vocal cords.
Q. On his vocal cords.
In any event, you have a recollection of your father returning from a doctor and expressing that he had been advised that he had polyps on his vocal cords from smoking; is that correct?
A. I don't know if he said from smoking,

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because I wasn't living there then. I knew he had surgery to have the polyps removed.

Q. Okay. The doctor -- your father's doctor advised he had polyps on his vocal cords and advised your father to quit smoking, to your knowledge, correct?

A. Yes, that's correct.

Q. And your father, in fact, then quit smoking, correct?

MR. ACOSTA: Object to the form.

Q. Now, to your knowledge your brother was aware that his father had quit smoking, correct?

A. Yes, he would have known.

Q. Do you recall, Mrs. Fife, your brother expressing any concern about his own smoking as a result of his father having quit?

A. No.

Q. Do you recall your brother attempting or advising you that he had attempted to quit as a result of his father's having quit smoking?

A. No, he never told me that.

Q. Ma'am, do you recall any instance in which your brother discouraged your father from quitting smoking, to your knowledge, in other words, in which you were present?

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A. No.
Q. You don't recall that, ma'am?
A. No.
Q. Ma'am, do you recall your brother ever trying to discourage anyone from quitting smoking?
A. No.
Q. Do you recall your brother ever suggesting that smoking is a safe activity?
A. No.
Q. Do you recall your brother ever suggesting that smoking was a healthy activity?
A. No.
Q. Now, Mrs. Fife, as I understand it you quit smoking yourself in the early 1980s; is that correct?
A. That's correct.
Q. And about a month after you had quit smoking, you had a conversation with your brother in which you mentioned that you had quit smoking; is that correct?
A. That's correct.
Q. And during that conversation your brother advised you that he himself had quit smoke being; is that correct?
A. That's correct.

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Q. In fact, your brother advised you that he had quit smoking six weeks earlier. You remember that?
A. Yes.
Q. Did your brother say anything else to you about quitting smoking other than he had quit six weeks prior?
A. No.
Q. Your brother didn't tell you anything about how he quit; is that correct?
A. No, he didn't.
Q. -- the question.
You don't recall your brother complaining during your conversation with him in which he told you that he had quit six weeks prior. You don't recall him complaining about any difficulty experienced with quitting during that conversation; is that correct?
A. That's correct.
Q. And, ma'am, to your knowledge your opinion brother never smoked again after that conversation.
A. To my knowledge, no.
Q. You've never seen him smoke?
A. No.

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Q. And he never told you that he was smoking?
A. No.
Say that again.
Q. I'm sorry. I was just trying to put a timeframe on this. I believe you indicated a few questions ago that that conversation occurred in the early 1980s.
A. Yes, that's right. Well, wait. 1980. well, I stopped smoking in -- in August sometime. I don't know exactly when.
And then he felt very happy that he had done it six weeks or so before I did. So we didn't talk about how hard it was to quit or anything. He just thought that was great that he beat me to it.
Q. Well, ma'am, you didn't discuss the process of quitting with your brother at all during that conversation other than that you had both quit. Isn't that correct?
A. I don't remember if I told him how I quit.
Q. But you don't recall him --
A. He didn't tell me how he did.
Q. Now, prior to this conversation in the early 1980s when your brother advised you that he had

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quit smoking, ma'am, do you recall him, again prior to that conversation, expressing an interest in quitting to you?
A. No.
Q. Prior to your conversation with your brother in which he indicated that he had quit smoking, do you recall him indicating that he had been trying to quit smoking?
A. No. It's not something that we discussed because we didn't see each other, you know. And whether he had been trying or not, I don't know.
Q. So, ma'am, it's fair to say that prior to this conversation that you had with your brother about -- in which you discussed that both of you had quit smoking, you don't recall your brother in any prior conversation indicating that he was trying to quit smoking, correct?
A. Correct.
Q. Now, ma'am, you've seen your brother from time to time during the past ten years; is that correct?
A. I haven't seen my brother since '93.
Q. When your father passed away?
A. Yes.
Q. And you had seen your brother from time

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to time prior to 1993, correct?
A. Once a year.
Q. Okay. And thinking about the period from the early 1980s through to --
A. '93.
Q. -- '93, yes, ma'am, do you recall or have any memory whatsoever which led you to believe that your brother might still be smoking during that time period?
A. I didn't know what he was doing because I wasn't there.
Q. Ma'am, do you have any recollection, thinking back to those visits, those annual visits with your brother, from the period of the early 1980s when he advised you that he had quit smoking, through to 1993, in that ten or so year time period, do you have any memory whatsoever of him doing or saying anything that led you to believe that he was still smoking?
A. No, no.
Q. No, he did not?
A. He didn't -- no, he didn't say that he was still smoking. And he didn't smoke. I mean, I never saw him smoke.
Q. Mrs. Fife, now I want to ask you how --

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how much older are you than your brother?
A. Three years and two months.
Q. All right. So you would have been born about 197 -- 1925?
A. Yes.
Q. And did the two of you go to the same high school?
A. We went to the same school, but not at the same time because I was four years ahead of him in school because I skipped some grades. So when he went to high school, I was going to college.
Q. Okay. So you were not around him at home when he was in high school?
A. He lived at home, and I lived at home when I went to college. So, you know, we both lived in the same home; but we had different circles of friends.
Q. Okay. Now, I believe you were asked some questions about your mother told you about smokings. Do you remember that?
A. Yes.
Q. Do you have any recollection of your mother ever talking to your brother about smoking?
A. No, I don't because as I said, it wasn't a formal lecture. It was just a remark that

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she would make and I remember when she would say it to me; but we didn't just sit down and have a meeting about it, you know.
Q. I believe you said that your mother told you that the reason she didn't want you to smoke was because it was filthy and it would cause you to have bad breath?
A. Yes --
MR. BEACH: Objection.
A. -- that's right.
Q. And is that something that you remember from the time that you were in high school?
A. Yes. She would say this before I ever smoked, you know.
She said, 'Don't ever start smoking, and here's why.' And I guess I was in high school.
Q. When you were -- did you smoke while you were in high school?
A. I smoked when I was a senior. I smoked one cigarette a day after lunch.
Q. Where did you get the cigarette?
A. Oh, well, we went to a luncheonette, four of us girls, because we felt too grown up to eat in the cafeteria anymore. And on the way to the luncheonette, there was a cigar store that sold all

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sorts of tobacco products.

And one of the girls told the rest of us -- I didn't even know -- but that you could go in the store and buy Lucy's, which was a pack of cigarettes that the owner, or whoever, kept behind the counter; and for a penny you could buy one cigarette.

So we bought one cigarette and smoked it after lunch and we didn't inhale, and we felt vary grown up doing that. But we never smoked any other time during the day or weekends. So that was the extent of my smoking in high school.

Q. And during the 1950s, do you remember ever having any conversations with your brother?

A. Yes.

Q. How often might you have seen him in 1950s?

A. Well, more often than we did later because we weren't so geographically separated.

Q. Where did you live in the '50s?

A. In the '50s? In Ohio.

Q. And where did your brother live in the 1950s?

A. In New York.

Q. And how you get together then if he

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lived in New York and you lived in Ohio?
A. I would go home to visit my parents for a week every year, and then we moved to Pittsburgh.
Q. When was that?
A. Oh, middle of '50s I guess. We only lived there for a year and then we moved to Connecticut.
Q. And how long were you in Connecticut?
A. About seven years.
Q. And then where did you go from Connecticut? Did you move to Texas?
A. No, we moved to California.
Q. California.
A. Uh-huh. (Indicating affirmatively)
Q. You remember what year you moved to California?
A. In the early '60s. And we were there less than two years.
Q. And then did you move to Texas?
A. Then we moved to Texas.
Q. And have you been in Texas ever since?
A. Yes.
Q. So from the mid 1960s until today you've lived in Texas?
A. Yes, we moved to Texas in 1962.

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Q. Do you recall specifically any conversation that you had with your brother about your father's vocal cord?
A. No, no.
Q. And you mentioned that you thought that your brother would have been aware of it or would have known about it. Were you simply speculating that he would have known about it?
A. I don't know when he knew about it.
Q. What I'm trying to find out is how you know that he knew about it. Do you have any idea as to how you know that he knew about it?
A. No. I would just be speculating. I don't know how he knew about it.
Q. Okay. And you never had any conversation with him about it, have you?
A. No.
Q. Now, after you moved to -- I guess California in the early '60s and then on to Texas, how often did you see your brother Floyd?
A. About once a year when I went to New York.
Q. Okay. And you just would see him when you went home to visit your parents and whoever else you knew in New York?

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A. Yes.
Q. Other than that one telephone call that you had in early 1980s regarding the time you quit smoking --
A. Yes.
Q. -- did you ever have any other conversation that you can remember with your brother about the topic of smoking at any other time?
A. No.
Q. And I believe you said that you had not seen your brother since 1993; is that correct?
A. That's correct.
Q. And during the -- let me ask you this: Did you ever -- when you lived -- visited New York during the '50s and '60s and '70s, and '80s, did you ever stay at your brother's home?
A. I almost stayed at my parents' home. I remember staying at his home in Florida one time. Twice, actually.
Q. Twice.
What decade would that have been?
A. That would have been -- I really don't remember. I guess -- I'm trying to think how I can know when it was. I really don't remember.
Q. And then over the years, do you have

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any recollection of any time your mother ever said anything to your brother about smoking?
A. Not that I know of, no.
Q. And do you have any recollection of anyone in your presence ever saying anything to your brother about smoking?
A. No."

THE COURT: All right, ladies and gentlemen, that concludes the testimony of those two witnesses. And so, at this point we will recess for today and see you at 9:00 tomorrow morning. Thank you.

(Whereupon, the jury was excused at 4:05 p.m.)

THE COURT: Okay, you may be seated.

With regard to some of the evidence that's pending, the summaries I'm not going to permit as exhibits. They may be used as demonstrative aids. I do think that the summaries, under 403, unduly emphasize a portion of documents in evidence. It would be akin to highlighting documents, which I've already indicated we're not going to do. When they're placed in evidence, however, the documents -- certainly, you may publish from

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the documents. With regard to the newspaper -- with the newspaper-type articles that were in four banker's boxes taken back to my chambers, I've only reviewed a portion of those, but those do appear, Mr. Acosta, to admissible specifically under 4, 5, and 6 of the risk utility test, those specific elements. As for the obviousness of the danger, common knowledge, and normal public expectation of the danger and avoidability of injury by care and use of the product, including the effect of instructions or warnings, it seems to me those three -- using the term "broad" is probably an understatement, but those three broad areas encompass a variety of information available to the general public.

In the negligence instruction, there's reference to general knowledge. Although it's not spelled out as such, it's -- you know, there's a duty to warn only when the hazards associated with the use of the product are not obvious are not reasonably apparent. That can encompass some general knowledge as well.

So, I haven't reviewed all of those

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articles, but it appears to me from the articles I have reviewed -- they appear to be admissible. By the same token, your -- I was comfortable during the case in chief to deliver the elements. Now, defendant's case has risen. In response to their evidence, you can certainly, on cross-examination and/or rebuttal, introduce documents which -- documents and/or other evidence which you feel is needed to adequately put the items they have placed before -- they're going to place into evidence into context, whatever that may be. I know between both sides there's numerous -- innumerable documents that have been accumulated.

But -- so, I have not looked at every -- I have not looked through all four boxes just simply because I have not had the time, but what I've seen would be admissible; and I -- so, I would encourage you to look through the rest of those documents to see if there's an issue, because it seems to me it falls in those broad categories outline by the risk utility test.

MR. BEACH: Your Honor --

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THE COURT: And I looked at the -- there's four documents on the warning issue. Those would appear, with the foundation, to be admissible as well.

Go ahead, Mr. Acosta.

MR. ACOSTA: I was just going to ask, when those documents get published, these newspapers and so forth, I didn't object when Dr. Townsend was going through them. It was happening so fast, I couldn't -- I -- there's no way any human being could have found the document, looked at it, and made sure -- I did find a Surgeon General issue that I would have had -- wanted to have read in conjunction with it under the rule of completeness. I couldn't get it out before the next question came up.

So, I'm going to ask that counsel slow down when they're doing these -- if they're going to do these newspapers, at least long enough to give me a chance --

THE COURT: I have no problem with that request. To the extent the witness is going to refer to a particular document, just make sure that counsel has the document. I have no problem with that, Mr. Acosta.

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MR. ACOSTA: I would just like to see it first.

THE COURT: And that works both ways. Whenever either side is referring to a document, opposing counsel certainly should have an opportunity to be able to pull it up.

MS. PARKER: Your Honor, may I get over there and get my notebook?

THE COURT: You may.

MS. PARKER: If I may, for the record, since Dr. Townsend has now testified, if I could just read in those warning numbers on the exhibits to lay the foundation for it? May I do that?

THE COURT: And just -- just hang on a second. Were there any other documents, Mr. Beach --

MR. BEACH: There were.

THE COURT: -- categories that I haven't covered yet.

MR. BEACH: Yes, Your Honor. We've discussed them and left it with some follow-up. For example, there was the published reference that you looked at yesterday evening.

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THE COURT: Yes.

MR. BEACH: Mr. Acosta and co-counsel reviewed that, and I'm advised they had no objection.

THE COURT: Other than the previously -- other than, I assume, the objection you previously stated --

MR. BEACH: Correct.

THE COURT: -- that I overruled.

MR. ACOSTA: Yes, that --

THE COURT: The only issue was relevance, you know. Yeah, okay.

MR. BEACH: We've provided Your Honor this morning obviously with that CD. I suppose --

THE COURT: I haven't looked at that yet.

MR. BEACH: And then finally, on the polling data, Your Honor, we -- as previously acknowledged, I've showed -- let me step back a second. As previously acknowledged, I'm going to admit the polling data on smoking and health.

I had -- for a comparison purposes so that when the historian testifies, to put the

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numbers -- the percentages of the population, knowledge and awareness in some context, we've excerpted out polls on eight other subjects; and as long as there's no objection to me showing a demonstrative that illustrates those other subjects, the -- the polling data that he had in his file, to which plaintiff counsel objects, is the data which underlies the demonstrative. So, if there's -- in other words, if there's no objection to the demonstrative, I don't have a problem with not admitting those into evidence.

MR. ACOSTA: I object to the contextual aspect of it for this reason: I don't believe -- well, what they're trying to do is to compare common knowledge in, say, 1990 or common knowledge in 1980 or common knowledge in 1920 with what common knowledge was in 1950 by suggesting that, you know, in 1980 to 1992, only 50 percent of the people knew who Al Gore was. And then to say -- to compare that with --

THE COURT: Except in Florida; right?

MR. ACOSTA: But I -- I don't think that those are fair comparisons without at

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least some kind of a foundation.

THE COURT: There needs to be some year. I mean, if there's an objection that the -- anything be received needs to have some kind of a year or the date of publications associated with it. I agree with that. I mean, there needs to be some idea of the relevant timeframe in anything, in any of these items of evidence that are going to -- you know, they need to be identified, because I think that's clearly -- there's going to be a lot of argument by both counsel as to what was known when. And so, as these exhibits are received, you need -- we need to clearly identify timeframes.

MR. BEACH: Your Honor, the clear -- that information is contained in the demonstrative. All I was simply attempting to do is offer that I don't need those -- those specific contextualized polls admitted as long as there's no objection to the demonstrative.

THE COURT: You're not seeking the admission of those; you are seeking to seeking to use them as demonstrative aids?

MR. BEACH: In case there's any

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question about the demonstrative -- I mean, the expert historian will testify, lay the appropriate foundation, about why this is relevant in comparison. It seems to me that if Mr. Acosta has concerns about it, that's a matter of cross-examination.

MR. ACOSTA: Absolutely. I agree.

THE COURT: All right. So, there's no issue with that.

All right. So, that takes care of -- other than the videos, which I haven't looked at --

MR. BEACH: That's correct.

THE COURT: -- those issues, other than Mr. Acosta -- I haven't looked at every one -- I mean, there were four banker boxes of newspapers -- newspapers, magazines, different types of articles. So, you need to look at those, too, and bring to my attention any specific items; but I have not looked at all of those yet, but I did look at enough to get a gist of what was there in context of the risk utility test.

MR. ACOSTA: Yes, sir.

MR. BEACH: Your Honor, if it's

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acceptable with the Court, I would propose that we will obviously provide the clerk with a copy that I have with me today, Your Honor, as well as index, which we can provide in electronic format; and I would be happy to provide the same list to Mr. Acosta so there's no question as to precisely what -- what we're providing to the clerk.
THE COURT: That's fine if that will facilitate the process.
MR. ACOSTA: Thank you.
THE COURT: All right. Now, Ms. Parker.
MR. BEACH: I'll do that after we conclude today, Your Honor.
THE COURT: Ms. Parker.
MS. PARKER: Just very briefly, can I read these numbers into the record and move their admissions now that Dr. Townsend has --
THE COURT: Go ahead.
MS. PARKER: AN-29, AIW-250, AIW-3641. That's -- I'm sorry, that last one has already been pre-admitted. I apologize. AIW-280, AS-321, AS-373, AN-550, AN-564, AN-544, AS-115, AS -- I'm sorry. That's it. AS-115.

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And then I just have one other.

THE COURT: Mr. Acosta.

MR. ACOSTA: I just need to find out if what you're moving into evidence is the complete document.

MS. PARKER: Well, I think some were magazine articles. It was not the whole magazine. It was just the --

MR. ACOSTA: Just the article?

THE COURT: The article. The complete article.

MS. PARKER: Right.

MR. ACOSTA: As long as it's the complete article, that's fine, Judge.

THE COURT: As long as the article being submitted is the complete article, although I think one of the references was one of those books. I don't know if you're submitting the entire book or not.

MS. PARKER: It's not one that we were -- it's not on this list.

THE COURT: All right.

So, those will be admitted as long as they're complete articles.

MS. PARKER: Your Honor, I hate to

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sound like a broken record, and I know I'm going to sound like it; but that biopsy report that Mr. Acosta is going to give to us --

THE COURT: Well, that's the next issue? What -- we've got -- I want to make it through at least one witness tomorrow. Who, if you know, is going to testify tomorrow, or have you decided yet?

MS. PARKER: It's either going to be Dr. Thomas or Dr. Rosenbach. I believe it's going to be Dr. Thomas, but he's been here since Monday thinking he was going to go on the stand Tuesday based on what Mr. Acosta said, and I have not had a chance to talk to him today about his schedule.

THE COURT: So, he is your number one --

MS. PARKER: He's the one I hope I'm putting on tomorrow.

THE COURT: And he is an expert in what field?

MS. PARKER: He is a toxicologist.

THE COURT: And he -- and the pathology is or is not an issue?

MS. PARKER: Is not with him.

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MR. ACOSTA: Your Honor, she keeps saying on the record -- and she's done it repeatedly -- that somehow I have done something with Dr. Townsend. I just want the record to reflect --

THE COURT: Townsend?

MR. ACOSTA: Dr. Townsend, that the reason that her witness was late is so on and so forth.

THE COURT: Well, listen -- I mean, the record will speak for itself. I mean, it's -- but on several occasions, you indicated you would be wrapping up within a couple of hours, and you didn't. It's -- it's not a problem. You're entitled to conduct -- I mean, as far as I'm concerned, each side is entitled to conduct as much or as little examination of the witness as they think is appropriate for their case.

You know, I -- it's your -- that is your right. I'm not -- Ms. Parker is accurate in noting that at different points you thought you would wrap up earlier. You didn't. I understand that. It's not something that I -- you're entitled to ask the questions. It

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didn't go as quickly as you obviously were anticipating or anyone else, but it's over. We've finished this witness.

So, the biopsy report.

MR. ACOSTA: Yes, sir.

THE COURT: Here's the issue on the biopsy report. Here's the issue that I'm concerned with: It -- it is a piece of evidence that was acquired after the close of discovery and after the commencement of trial. So, you're not going -- and I've indicated before that before it gets used in some fashion you need to have the authority of the Court. Nonetheless, cross-examination -- you know, what you're able to do during your cross-examination is broader than what you can offer during your case in chief.

So, the question is -- so, here's the question I need to know: Are you going to use the biopsy information in some fashion during cross-examination?

MR. ACOSTA: Depending on what the direct is, yes.

THE COURT: And that would be if there was a contradiction of the results of that

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biopsy report?

MR. ACOSTA: Well, it would be --

THE COURT: I assume some sort of testimony that would -- that in your opinion would contradict what the results were.

MR. ACOSTA: Yes, and there may be other things as well. It depends on what the witness says; and it's quite difficult to anticipate what the witness is going to say, but that biopsy report may be relevant for a number of reasons.

THE COURT: Here's what you need to do, because if we were in discovery, you would obviously need to give the report to opposing counsel. So, you need to get -- do they have --

MR. ACOSTA: They got the report before me and didn't give it to me.

THE COURT: That's all right.

Do you have the full report?

MR. ACOSTA: I have --

THE COURT: I say it's all right. It's not all right; but, I mean, it's all right as far as I'm concerned right now.

MR. ACOSTA: I have a report. As full

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as it was at the time --
THE COURT: I need you to give the reports that you have to them, a copy of them, so we're just clear that they've got exactly what you've got.
MR. ACOSTA: Okay.
THE COURT: Okay?
MR. ACOSTA: I'll do that.
THE COURT: And -- and then --
MS. PARKER: That's all I want.
THE COURT: Then, you know, because if you were in discovery, you clearly would need to produce it.
MR. ACOSTA: I'm not -- sure.
THE COURT: Make sure they have that report, and pass that -- I don't know if there's -- I don't know if there's any issues I need to address with this.
MR. ACOSTA: I don't either. I don't know that they're going to call Dr. Rosenbach or not.
MS. PARKER: I don't think there's any other issues at this time. I just want to get -- Mr. Acosta said Monday or Tuesday, whatever.

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THE COURT: I recall the whole thing. We don't have to go back through it. I just need you to give them the report; because if you were in discovery, you would have to do it.

MR. ACOSTA: I will, Judge.

THE COURT: It's as easy as that.

MR. ACOSTA: There is another issue, and it has to do with Dr. Thomas. We sent expert interrogatories in the case.

THE COURT: Thomas is? Is he the toxicologist?

MR. ACOSTA: He is the toxicologist.

We sent out expert interrogatories in the case, and we did it timely just before the close of discovery and asked them to tell us what their expert opinions and so forth are going to be.

Dr. Thomas -- the answer that they gave indicates that he's going to speak generally about toxicology and risks of smoking and exposures to various things and all that. They didn't provide any opinion that Dr. Thomas was going to say anything related to Mr. Kenyon directly.

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And, for example, they have no doctor listed -- in these expert interrogatories, no doctor was disclosed in their answer that would say that Mr. Kenyon has any ailment associated with any of these risks. He doesn't have asbestosis. He doesn't have any exposure to radon. There's no evidence that he's got any of those things; and there can be none, because they answered interrogatories and did not disclose those opinions from anyone.

So, I don't want Dr. Thomas to come in and testify that Mr. Kenyon lived in an area war there was radon or he lived in an area where he got asbestos exposure or he lived in an area of high air pollution or anything like that. For one thing, they didn't disclose Dr. Thomas as providing an opinion like that. Secondly, it would be improper, because there is no -- there is and will be no testimony that Dr. -- that Mr. Kenyon suffered as a result of that. And I think it would be prejudicial for them to try to put on some evidence through this witness about any specific exposure that Mr. Kenyon may or may

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not have.

Now, I don't mind them putting it on in general terms, because that may go to the overall risk associated with lung cancer or something like that, but not when it comes specifically to Mr. Kenyon, because there are no opinions like that, and there can be none.

THE COURT: When I address the depositions of the school -- co-school workers, I noted there has -- on those asbestosis issues, there had to be a foundation, because it's not obvious from those depositions there was any friable asbestos within that school building. The fact that somebody works in a building with building materials that incapsulate asbestos is not enough to create that issue. So, there has to be some kind -- I agree, Mr. Acosta, there has to be some kind of foundation before they can specifically go into issues.

Now, if there's a foundation and then you're going to contend there is a surprise because they haven't had disclosure, that's another issue. But I don't know -- I'm just -- one, there has to be some kind of

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foundation. Two, after there's a foundation, you know, there has to have been an appropriate disclosure of what -- what the testimony will be, you know, in response to the question; and I don't know what the questions were, but there has to be an appropriate disclosure that would put individuals on notice as to the proposed testimony.

MR. ACOSTA: Is there a standard expert interrogatory?

THE COURT: So, I agree there has to be -- the foundation has to be laid, and then there has -- there has to have been an appropriate disclosure --

MR. ACOSTA: (Nods head.)

THE COURT: -- if the appropriate question was made.

So, do you understand that, Ms. Parker?

MS. PARKER: I sure do.

THE COURT: Very good. So, we're all --

MR. ACOSTA: Thank you.

THE COURT: -- we all have an understanding there.

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So, Thomas is likely?

MS. PARKER: Either Thomas or Rosenbach. I believe it's Dr. Thomas.

THE COURT: And you said three hours with Thomas direct -- your direct examination?

MS. PARKER: If we start at nine, I hope I'm through by 12.

THE COURT: I'm just asking you, that's your best estimate?

MS. PARKER: Either that or, if we break from 12 to 1:30, I'll be through by 2 or 2:15, somewhere in that timeframe.

THE COURT: All right. So, we will -- I would like to -- you know, if possible, I would like to conclude a witness. If I can't, I can't.

MR. ACOSTA: I would, too, Judge.

THE COURT: But the next time the witness is going to appear is Wednesday. That's the main reason why I want to conclude this, so we can finish up and go to Wednesday.

Do you have something, Mr. Denson?

MR. DENSON: Just because where we ended yesterday with the impeachment issue regarding the financial relationship of the

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witness to the parties. I've got the Boucher case from the Supreme Court, which, I think, is the most recent case on that. I've given defendants a copy and a copy for you.

THE COURT: Sure. Thank you.

All right. Anything further?

MR. ACOSTA: (Shakes head.)

MR. FUHRMAN: Yes, Your Honor. I guess --

THE COURT: Okay.

MR. FUHRMAN: I'm sorry. Since Mr. Denson passed up, I guess, the Boucher case, this has to do with what they can ask about how much an expert has been paid; and I just -- I want -- we need the know if the ruling --

THE COURT: I'd just tell you, this is my understanding -- and I'll be happy to re-read the cases. My understanding is you can ask him how much they're charging, how much they were paid on this file. You can ask them what percentage of time they devote to representation of this client and what percentage of their -- you know, whether they, you know -- whether they do any work for the

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other side and if they only represent members of a certain industry. You can ask that. But you can't ask about any -- my understanding is you cannot ask about annual salaries generated from their work.

Am I incorrect about that?

MR. DENSON: I think you're incorrect. The Boucher case states that they can discover and can ask about and it's relevant as well for the jury to know what the cumulative amount that a party has been paid. If you turn to page 6, at the top right corner, Headnotes 3 and 4 at the top left corner there --

(Pause.)

THE COURT: So, that's fine. I'll have a -- I'll have an answer.

Here's the issue: The issue is Number 4 on the Footnote 6; right? Isn't that the issue? "However, an expert shall not be required to disclosure earnings as an expert" --

MR. DENSON: Yes, sir. That's the issue.

MR. FUHRMAN: Yes, sir.

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THE COURT: -- "from other services," because it's clear that he can -- an expert's involvement as an expert, which may be the number of hours -- the percentage of hours -- percentage of income derived. So, I -- you know, I could be totally wrong, but I recall there was a recent case on this issue. So -- but I'm sure my trusted law clerk will have it by tomorrow morning and I'll be able to enlighten everybody by then.

MS. PARKER: Thank you, Your Honor.

MR. FUHRMAN: Thank you, Judge.

MR. ACOSTA: Thank you, Judge.

THE COURT: Court will be in recess until 9.

(Whereupon, the proceedings were concluded at 4:30 p.m.)

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COURT REPORTER'S CERTIFICATE

STATE OF FLORIDA)
CIRCUIT OF HILLSBOROUGH)

I, MARY ELIZABETH BLAZER, Court Reporter for the 13th Judicial Circuit of the State of Florida, in and for Hillsborough County,

DO HEREBY CERTIFY that I was authorized to and did report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 2456 to 2581, inclusive, constitute a true and correct transcription of my shorthand report of said proceedings and evidence.

Dated this 29th day of November, 2001.

____

Mary Elizabeth Blazer, RPR

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